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Supreme Court of the United States
October Term, 1936.

JOSE MATOS, PETITIONER,

vs.

ALONSO HERMANOS, *et al.*, RESPONDENTS.

BRIEF FOR PETITIONER.

This is a proceeding to review by certiorari a decision of the United States Circuit Court of Appeals for the First Circuit which, by a divided Court, reversed a unanimous judgment of the Supreme Court of Puerto Rico. The writ of certiorari was granted by this Honorable Court on October 12, 1936.

Opinions of the Courts Below.

In the Circuit Court of Appeals the majority opinion was rendered by Judge MORTON and the dissenting opinion by Judge BINGHAM. Both opinions are reported as "*Hermanos v. Matos*" at 81 Fed. (2nd) 930. The majority opinion appears at page 50 * and the dissenting opinion at page 56 of the Transcript. The

* NOTE.—All references in this brief to pages of the Transcript refer to the pages as numbered in the Transcript printed under direction of the Clerk of this Court, the paging of which differs from the paging of the certified copy of the record before the Circuit Court which was filed with the petition for certiorari.

decision of the Supreme Court of Puerto Rico was unanimous. It is printed in the Spanish edition of the Official Supreme Court Reports at 46 D. P. R. 470. The opinion of the Supreme Court of Puerto Rico denying reconsideration appears at 46 D. P. R. 909. Neither opinion is as yet published in the English edition of the reports but the original opinion of the Supreme Court appears in the Transcript at page 24. The opinion denying reconsideration does not appear in the Transcript but we are including it as Appendix B to this brief in English. The opinion of the Trial Court is not published but appears at page 17 of the Transcript.

Jurisdiction of This Court.

The judgment to be reviewed was rendered on February 12, 1936 (Tr. p. 64), while the Circuit Court of Appeals entertained a petition for re-hearing (Tr. p. 64) and denied the same on April 30, 1936 (Tr. 66). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (Chap. 229, 43 Statutes 936; Title 28 U. S. C. A. Section 347).

Statement of the Case.

This matter involves the interpretation of certain provisions of the Civil Code of Puerto Rico, originally taken from the Civil Code of Spain, and their application to a sale of a herd of cattle of which a portion were found some time after delivery to be suffering from tuberculosis. The Circuit Court of Appeals by a

majority vote reversed the judgment of the Supreme Court of Puerto Rico reversing the interpretation given by the Supreme Court of Puerto Rico to such statutes of Spanish origin and their application to the facts in this case (Tr. p. 50). Circuit Judge BINGHAM dissented and voted for affirmance (Tr. p. 56).

On March 1, 1929, petitioner sold and delivered to respondents 122 head of cattle "of different nature, race, gender, ages and color for the lump sum of $18,000". Of this purchase price the respondents paid petitioner $3,000 in cash and deeded to him a piece of real property as payment of an additional $5,000. They executed mortgages on three additional parcels in favor of petitioner to secure the deferred payment of the balance of the purchase price, amounting to $10,000. (Complaint, Tr. p. 1, *et seq.*)

On March 18th three of the cattle died, and they continued to die up to the time the suit was filed on December 12, 1929. On that date respondents brought this suit before the District Court for the Judicial District of San Juan. The complaint (Tr. 1) alleges the facts just set forth and also alleges that at the time of filing the complaint a total of 43 cattle had died and 29 more had been killed by the Department of Sanitation after the application of tuberculin tests to the herd. The complaint further alleges that the cattle had tuberculosis at the time of the sale but that it was impossible to determine at the time of that sale that the cattle were suffering from any hidden disease (Tr. 3).

The complaint prayed the Court to enter "a judgment declaring null and void, in accordance with section 1397 of the Revised Civil Code" the entire con-

tract of sale; that the Court decree the cancellation in the Registry of Property of the mortgages given to secure the unpaid portion of the purchase price; and for a money judgment in the amount of $8,000, covering the $3,000 cash payment and $5,000 representing the value of the parcel conveyed as part payment upon the sale (Tr. 5).

The complaint sets forth (Tr. 4) the date upon which each of the 43 cattle died, these dates covering a period of over nine months from the date of the sale. Twelve of the cattle had died within forty days from the date of delivery and a total of twenty had died prior to July first.

Petitioner denied the material facts alleged in the complaint except that he admitted the contract as pleaded (Tr. 11). As an affirmative defense he pleaded negligence on the part of the respondents (Tr. 13) and both by demurrer (Tr. 8) and in his answer (Tr. 14) he pleaded prescription.

The Trial Court found that some of the cattle had tuberculosis at the time of the sale and delivery, but made no finding as to the number of cattle diseased at the time of the sale. It is admitted that petitioner acted in good faith and sold the cattle without knowledge that any of them were diseased.

In spite of the fact that the cattle started to die eighteen days after delivery and that twenty of them had died prior to July first, respondents apparently made no effort to discover why the cattle were dying, as it was only by accident that they discovered the presence of tuberculosis in July. The Trial Court found (Tr. 19):

"that in July, Varas a veterinary surgeon came to examine a dog and in passing also examined the cattle; that he performed an autopsy on one cow and found that it had tuberculosis; that then the plaintiffs went to see the defendant, explained the situation to him and he said that he did not have anything to do with it;"

There is no evidence included in the record, save the report of an ocular inspection by the Trial Court which has no bearing on the questions involved. The Supreme Court of Puerto Rico had the evidence before it but upon the appeal to the Circuit Court of Appeals the respondents (there appellants) omitted the evidence from the transcript filed there. Petitioner, appellee before the Circuit Court of Appeals, moved that Court to include and print the entire record before the Supreme Court but the Circuit Court of Appeals denied the motion (Tr. 50). Consequently, on all questions of fact the parties here are limited and bound by the findings of the Trial Court, which appear at pages 17, *et seq.* of the Transcript, and any reference to or discussion of the evidence introduced before the Trial Court would be improper.

Upon the facts we would call the Court's attention particularly to two matters, the importance of which will appear later from our argument, to wit:

1. There is no evidence or finding as to how many of the cattle were diseased at the time of delivery. The Trial Court found that some were diseased but did not attempt to fix the number. The Court did find, however, that 50 of the cattle were sound at the time of the

trial (Tr. 23) and this finding was accepted without question by both the Supreme Court of Puerto Rico and the Circuit Court of Appeals and is binding upon the parties here. Respondents, in their brief in opposition to the petition for certiorari before this Court, argued that "it was natural and inevitable that the remaining 50 animals would develop the disease as a result of their contact with the rest of the herd". Respondents are barred from engaging in any such presumption in view of the express finding of the Trial Court that the 50 cattle were in good physical condition at the time the case was tried.

2. There is no allegation in the complaint and no proof or finding that the respondents would not have purchased the sound animals without the defective animals.

The Trial Court held that the entire contract was without consideration and inexistent and that, there being no contract, respondents were entitled to recover the entire purchase price, but that they must return to petitioner the fifty sound animals (Tr. 17).

Upon appeal, the Supreme Court held by a unanimous decision that a breach of Section 1397 of the Revised Civil Code gave rise only to a redhibitory action, an action to rescind for breach of warranty against hidden defects; that here respondents' only right of action was a redhibitory action to recover for the animals actually affected by tuberculosis, and that under Section 1399 of the Revised Civil Code such action was barred prior to the filing of the present

suit (Tr. 24). The Supreme Court held that the demurrer for prescription should have been sustained, reversed the judgment of the District Court, and ordered the complaint dismissed (Tr. 43). The Supreme Court denied a motion for reconsideration (Appendix B).

Upon appeal, the Circuit Court of Appeals by a majority vote reversed the Supreme Court of Puerto Rico and ordered the case remanded with instructions to permit respondents to amend their complaint in the Trial Court in such a way as to seek recovery only of the price of the 72 cattle which had died and been killed. The majority opinion held that the contract of sale might be divided and considered as two separate contracts, one covering the sound cattle and one covering the diseased cattle, or into 122 separate contracts, each for one cow. They held that as to such contract or contracts covering only the diseased cattle, there was a total lack of consideration under Section 1397 and that an action would lie to recover the price upon the theory that the contract was inexistent (Tr. p. 50).

Circuit Court Judge BINGHAM dissented and in a dissenting opinion (Tr. p. 56) held that there was only one contract and that it could not be divided up and treated as separate contracts. He held that there was sufficient consideration to support the contract, that the contract was existent, and that respondents' cause of action was either for damages for breach of warranty or a redhibitory action for rescission, both of which had prescribed.

Specifications of Errors Urged.

Petitioner respectfully submits that the Circuit Court of Appeals in reversing the judgment of the Supreme Court of Puerto Rico, has erred:

1. In failing to follow the rule established by this Honorable Court that in matters which relate entirely to the construction or application of local statutes, especially those of Spanish origin, the decisions of the Supreme Court of Puerto Rico will not be disturbed or set aside unless they are clearly wrong.

2. In reversing the decision of the Supreme Court of Puerto Rico that plaintiff's right of action was redhibitory and was barred by prescription.

3. In holding that the contract of sale herein was divisible into two or more contracts, and in so interpreting the decision of the Supreme Court of Puerto Rico.

4. In permitting the amendment of the complaint to state a cause of action upon an implied contract for money had and received, when respondents had a remedy upon the express contract for breach of warranty, which had prescribed prior to suit.

5. In permitting the amendment of the complaint to set up an entirely new and different cause of action from that alleged in the original complaint after such new cause of action had been barred by prescription.

ARGUMENT.

Summary.

Petitioner will argue that:

1. Respondents' sole right of action was a redhibitory action for the partial rescission of the contract in so far as the diseased cattle were concerned, or an action for a recovery of that part of the sales price corresponding to the value of the diseased cattle, and that such right of action was barred by prescription under Section 1399 of the Revised Civil Code of Puerto Rico prior to the filing of this suit.

2. There was but one contract and such contract was not divisible.

3. The Circuit Court of Appeals erred in permitting respondents to amend their complaint to state a cause of action on an implied contract;

(a) Because respondents had an adequate remedy on the express contract; and

(b) Because the amendment would state a new cause of action already barred.

4. The Court erred in reversing the Supreme Court on matters of Spanish law.

5. The result reached is not just.

POINT I.

Pulmonary tuberculosis in an animal constitutes a redhibitory vice, which is a breach of warranty, and gives rise to an action for rescission of the contract, or at the vendee's option, an action for damages for breach of warranty, both of which actions had prescribed when this suit was brought.

The complaint proceeds upon the theory, and respondents so contend, that the contract of sale was wholly inexistent,—that no contract at all was entered into between the parties,—that the contract was a nullity in toto, and that they are entitled to recover the entire purchase price of the 122 cattle because of the fact that a portion of the cattle were suffering from pulmonary tuberculosis at the time of the sale, and notwithstanding that upon the trial it was admitted and found that 50 head were sound and well. They base this contention upon the following section of the Revised Civil Code of Puerto Rico:

> "Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.
>
> A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

Respondents would disregard entirely the sections of the Code surrounding Section 1397 and consider this section by itself, maintaining that because of this sec-

tion this case is governed by the following sections of the Revised Civil Code.

> "Section 1228.—There is no contract unless the following requisites exist:
>
> 1.—The consent of the parties.
>
> 2.—A definite object which may be the subject of the contract.
>
> 3.—The cause (consideration) for the obligation which may be established.
>
> Section 1238.—All things, even future ones, which are not out of the commerce of man, may be objects of contracts."

Respondents maintain that since under Section 1397 cattle suffering from a contagious disease could not be the subject of a contract of sale, there was "no definite object which may be the subject of the contract" and likewise no "cause (consideration) for the obligation".

Petitioner contends, and the Supreme Court of Puerto Rico so held, that it is clear from the context of Section 1397 and its position in the Civil Code, the history of the section itself, and from the opinions of the Spanish commentators, that pulmonary tuberculosis in cattle is a hidden defect and, like any other hidden defect in an animal or thing sold, is a breach of warranty and gives rise to an action for damages for breach of warranty (a proportional reduction of the price under Sections 1389 and 1394 of the Code), or an action to rescind the contract in whole or in part, as the case may be, for such breach of warranty. Petitioner contends, and the Supreme Court so held, that notwithstanding the breach of warranty there was an

existing contract between the parties which cannot be adjudged to be an inexistent contract under Section 1228, and that the true meaning of Section 1397 is that the contract is not void but voidable.

The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico upon this point, but far from being clearly wrong the decision of the Supreme Court is clearly right on principle and is supported by the overwhelming weight of authority.

Section 1397 is not placed in that chapter of the Civil Code which treats of "Nullity of Contracts" (Chapter VI of Title II of Book 4th), but in Title IV which treats of "Contracts of Purchase and Sale" in a subdivision entitled "Warranty against hidden defects of or burdens on the thing sold". This subdivision comprises 16 sections of the Code, all dealing with the warranty against hidden defects. For the convenience of the Court we are printing the entire subdivision as Appendix "A" to this brief.

Sections 1387 and 1388 make the vendor liable for hidden but not for patent defects; Section 1389 gives the vendee an option to withdraw from the contract or demand a proportional reduction of the price; Sections 1390 and 1391 refer to a loss of the thing sold; Section 1392 refers to warranties in judicial sales, and Section 1393 provides a six months' Statute of Limitations on actions based on the preceding sections. Section 1394 is peculiarly applicable to the present case. It provides:

> "Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special price for each of them, the red-

> hibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.
>
> This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same."

Section 1395 makes the provisions of the preceding section applicable to things other than animals. Section 1396 provides:

> "Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, *except in the case prescribed in the following section.*" (Italics ours.)

Then follows Section 1397 (*supra*), upon which respondents rely. Section 1398 provides that if the hidden vice is such that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory, but if the veterinarian by negligence or bad faith fails to discover it, the veterinarian shall be liable. Section 1399 then provides the Statute of Limitations which the Supreme Court held to bar the present action, as follows:

> "Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee unless, by reason of the customs in each locality, longer or shorter periods are established."

Section 1400 treats of the death of an animal within three days after delivery. Section 1401 requires the return of the animals sold if the sale be rescinded, and Section 1402 gives to the vendee of animals suffering with redhibitory vices, the option to withdraw from the contract or demand a proportional reduction in the price.

This whole chapter or subdivision was copied from the Spanish Civil Code of 1889, which was in force in Puerto Rico at the time of the change of sovereignty. We submit that clearly these sections were intended to constitute and do constitute a complete statute covering the matter of warranty against hidden defects and that all of its sections are parts of an integrated plan and must be read together. We submit, and the Supreme Court so held, that Section 1397 refers to a warranty against hidden defects just as much as do the other sections in the Chapter. The Legislature could never have intended to interpolate into this statute on warranties a section covering the inexistence of contracts which in itself would negative any idea of a warranty. If the contracts referred to in Section 1397 were inexistent, clearly there would be no warranty, as there would be no contract upon which to fasten the warranty, and yet this section appears as an integral part of this Statute covering warranties.

Upon the question of whether the contagious diseases referred to in Section 1397 constitute a redhibitory vice and a breach of warranty as maintained by petitioner, or whether they make the contract wholly inexistent and hence preclude the possibility of any

warranty, as contended by respondents and as held by the Circuit Court of Appeals, the concluding phrase of Section 1396 (italicized above) is peculiarly enlightening. This section provides that the warranties against hidden vices of animals shall not obtain in sales made at fairs, etc., "except in the case prescribed in the following section", and the following section is the disputed Section 1397 referring to contagious diseases. Unless the Legislature understood and intended that the contagious diseases referred to in Section 1397 were hidden vices, and a breach of warranty, the last clause of Section 1396 would be absolutely meaningless.

The history of this legislation shows conclusively that pulmonary tuberculosis in cattle was understood and intended by the Legislature to be a redhibitory vice and subject to the short Statute of Limitations contained in the present Section 1399 (*supra*).

(a) The applicable legislation and commentaries thereon.

The Enciclopedia Juridica Espanola (Spanish Legal Encyclopedia) traces these sections on warranty and especially the redhibitory action based on defects in the thing sold back to the time of the Aediles in Rome. Defining the redhibitory action, the Enciclopedia says (Translating from Vol. XXVI, p. 884):

> "An action of the Roman Law available to the vendee in a contract for sale.
>
> "According to a special provision of the aedelician edict, the vendor was responsible for all hidden defects (*morti vitra*) which the thing sold had at the time of the contract, even though

> they were known to him and he was likewise responsible for all the stipulated qualities which the thing should have or should not have (*dicta promissa*). So that when the thing sold had hidden defects or when the *dicta* and *promissa* qualities were not established, the vendee might always elect either to demand the rescission of the contract or a diminution of the price, both where the defects were capital as well as where they were secondary.
>
> "In the former case the action exercised was the '*actio redhibitoria*' which prescribed in six months when the vendor had given bond for the defects of the thing sold and in two months when it was otherwise. The redhibitory action could be resorted to only once * * *.
>
> "Our private law has substantially adopted the redhibitory action when authorizing the rescission of contracts of sale by reason of defects in the thing sold, under the general Civil Law as well as under the special Commercial Law, and it distinguishes between defects easily detected upon examination by the vendee and hidden defects when fixing the period of time available for the rescission."

With special reference to the subject of vices in animals or things sold, and commenting on the applicable provisions of the Spanish Civil Code (identical with the corresponding enactments in force in Puerto Rico), the encyclopedia says:

> "*Civil Code. Concept and basis of the doctrine of redhibitory vices.* The Civil Code uses the expression 'redhibitory vice' in referring to the vices of animals; but in the same connection it also uses the expression 'hidden vices', gen-

> erally employed by the Code when referring to vices in the thing sold. In view of the enactments set forth in the Code and the etymology of the word 'redhibitory', we really think that this adjective may be applied to all the vices, whether in animals or in things sold, which may cause a rescission of the sale, and that the two expressions *'hidden vices' and 'redhibitory vices' are therefore equivalent.*" (Vol. XXX, p. 798.)

The encyclopedia has defined the term "redhibitory vice" thus:

> "Redhibitory Vice. Common civil law (3). 1st concept. Etymologically, a redhibitory vice is one which gives rise to the return of the thing.
>
> "Historically, the concept has been rendered more definite and the term now serves to designate those *hidden defects* or vices in the things transferred by sale which either render such things unfit for their normal service or greatly diminish their usefulness, and which for this reason may give rise to a rescission of the sale." (Id., p. 797.)

Referring to Articles 1493 and 1494 of the Spanish Civil Code (corresponding to Sections 1396 and 1397 of the Puerto Rico Code, upon the latter of which plaintiffs base the present action, the Enciclopedia is of the opinion that when the code uses in Article 1494 the word "void" it does so inadvertently and really means "voidable". It says (translating):

> "In making this exception (that of Art. 1493) regarding the existence of a warranty, the

Code says that such warranty shall not obtain in the two instances to which we have just referred, '*except in the case prescribed in the* following article.' This expression definitely suggests that in the case of the said following article warranty shall obtain.

* * * * * * *

"The Article to which we refer says that cattle or animals suffering from contagious diseases shall not be the subject matter of a contract of sale and that any contract made with respect to the same shall be void, and immediately adds that a contract of sale of cattle or other animals, when the use or service for which they are intended having been stated they are found to be useless therefor, shall also be void.

"Should this Article be understood in its literal sense? If so, then the words *except in the case mentioned in the following article* used in the preceding article are mere surplusage, because the redhibitory action arising from warranty has important differences which distinguish it from the action for nullity. Must it be understood that Article 1494, in speaking of nullity, does so by inadvertence and defectiveness of expression? This hypothesis cannot be excluded, for the authors of the Code did not always frame its provisions in a precise language." (Id., pp. 801-802. Italics ours.)

Q. Mucius Scaevola, the great commentator on the Spanish Civil Code, in discussing Articles 1493 and 1494 of that Code, uses this forceful language (translating):

"This subject of the sale of animals has been brought into the Code in fragments, which form

a veritable juridical crazy-quilt made up of all sorts of materials and hues. The contrast exhibited by the provisions as against each other is as striking as it is queer; the deficiencies noted are as numerous as they are regrettable; and were it not for the fact that, in reality, notwithstanding their divers origin and the independence with which they clothe themselves, they all respond essentially to very well known and old principles which are identified through them, it would be practically impossible at times to ascertain the intention of the legislator.

"The two articles which we have before us (corresponding to Sections 1396 and 1397 of the Civil Code of Puerto Rico) are good proof of these conclusions, for, looking at their phraseology only, they appear to seek entirely different purposes, whereas essentially they are perfectly consistent. As regards the legal terms they use and the accuracy of their provisions, they are likewise objectionable. Thanks to the good fortune that these articles apply to causes, which are generally of small import and can be determined in oral trials (*juicio verbal*), the consequences will not be very serious. Otherwise, both these articles and all which follow in the same section would render themselves famous in the annals of Judicial administration." (23 Scaevola, p. 655.) (Matter in parentheses added.)

Referring to the opinion thus expressed by Scaevola, the Supreme Court of Puerto Rico in its opinion in this case says:

"This *crazy-quilt* (edredon), as Scaevola characterized it, has impelled us to make a wider examination of the authorities than is ordinarily necessary.

"Up to 1889, when the Spanish Civil Code was passed, it may be noted that the time in which a redhibitory action should be brought was a limited one: from time immemorial a period of not more than six months. If by Section 1397, to take the extreme case, the legislator thought that the existence of a contagious disease would render a contract for the sale of cattle non-existent, did the legislator show any intention of preventing such an action from ever prescribing? As some of the commentators say, it seems inconceivable that the intention was to prevent such an action from prescribing or relegate the prescription to the term of four years determined by the chapter on the nullity of actions, or to the period of fifteen years provided in the code for the limitation of actions when no term is otherwise provided.

"As the prescription of forty days was first introduced into the code along with the reformed precept of Section 1397 (1494 of the Spanish code) the strong probability is that the legislator thought that a shorter period than formerly was advisable. We have elsewhere made the comment that the Spanish legislator probably did not have tuberculosis in mind. The only way to harmonize the whole matter is to conclude that the legislature continued to think that the obligation incurred by a vendor of cattle with a contagious disease was responsive to a redhibitory claim that the purchaser had, and the legislature also had in mind that the period of prescription for all redhibitory actions, including those involving animals affected with contagious diseases, should be short. For other occult vices in sale of property the prescriptive period of six months prevails. The way to harmonize the whole chapter is to declare that the legislature was fixing different periods of pre-

scription for every occult vice enumerated therein; in other words, a period of six months for ordinary vices and a period of forty days when animals were involved. It may even be that the legislature had in mind contagious diseases in animals when it fixed the prescription of forty days, inasmuch as most diseases of that nature would come to light before that time.

"The introduction in 1889 of a period of prescription of forty days and the enactment of Section 1397 at the same time would be a strange coincidence, if they had no relation to each other." (Tr. pp. 39-40.)

The Spanish commentator, Modesto Falcon, in his work on the Civil Code, says in referring to the warranty against hidden defects (translating):

"As the hidden defects which give rise to the warranty have always been called redhibitory vices, the warranty obtaining in such cases is similarly named, and likewise the action available to the vendee. The effect of redhibition is that the vendee may elect to rescind the contract or demand a proportional reduction of the price. If he elects the former, the vendee and the vendor must restore to each other, respectively, the thing sold and the price, and in addition thereto, the expense which the purchaser may have incurred must be reimbursed to him. If he elects the latter remedy, in absence of a contrary stipulation, experts appointed by both parties will determine the amount of the depreciation occurred in the thing sold by reason of the hidden defects or encumbrances discovered therein.

"When the thing sold is lost on account of the hidden defects, the loss falls on the vendor, who must return the price, and pay the expenses

incurred, with damages, if he acted in bad faith." (4 Falcon, p. 230.)

And referring particularly to the sales of animals and to the special rules to which such sales are subject by reason of the frequency of the hidden defects and the greater ease with which they can be concealed, the same author says:

"The sale of animals is subject to most special rules by reason of the frequency of hidden defects and the greater ease with which they can be concealed. Because of this the rules enacted by the codes are quite special. Some of the codes specify the hidden vices or diseases which are designated as redhibitory and thus give rise to a warranty. Accordingly, they group cattle in various classes. It was so proposed in our project for the Code of 1851, and accomplished by the Austrian and Bavarian codes. The majority merely set forth the general rule, which in the case of some, such as the French Code, has been supplemented by special legislation. This is the system adopted by our own code, and article 1496 thereof has a future law in contemplation when it referred to vices or defects specified by law.

"Where several animals are sold together and redhibitory vices are discovered in some of them, the warranty operated only as to the latter; but this rule does not apply where it clearly appears that the vendee would not have purchased all of the animals had he known that some were defective—as in the case of teams of horses or of mules, yoke of oxen, and other animals dealt in pairs.

"In sales of cattle made at fairs or at public markets the *warranty against hidden vices does*

> *not obtain, except when the animals are suffering from contagious diseases, or when the service for which the animals are intended having been stated in the contract, they are found later to be useless therefor.''* (Id., p. 230. Italics ours.)

In his Commentaries on the Spanish Civil Code, Vol. 4, page 507, don Leon Bonel y Sanchez, referring to Article 1494 of that Code (equivalent to Section 1397 of the Civil Code of Puerto Rico), cites with approval the classification of the redhibitory vices made by the authors of the Spanish Code Draft or Project of 1851 and (at p. 508) considers *pulmonary tuberculosis* as a *redhibitory vice.*

The commentator Don Antonio Martinez Ruiz, in his work on the Spanish Civil Code, Vol. 9, pp. 356-363, considers Articles 1491 to 1499 of that code, relating to the sale of animals, including, of course, Article 1494 (equal to 1397 of the Civil Code of Puerto Rico), the first paragraph of which provides in effect that cattle and other animals suffering from contagious diseases cannot be the object of a contract of sale and that any contract made with respect to the same shall be void. Referring to the above articles as a whole, the commentator says (pp. 362-363):

> ''In all of the articles considered in this commentary mention is made of redhibition, that is, of the vendee's right to rescind the contract. This is not, however, the only right given to him to compensate whatever damages the vices or defects of the animals sold may have caused him. Article 1499 makes extensive to sales of cattle and other animals the provisions of article 1486, under which the vendee may elect—with-

out anything to limit this right of election—to withdraw from the contract, the expenses which he may have incurred being returned to him or be reimbursed a proportional part of the price, according to the judgment of experts.

"The time within which any of these actions—whether for rescission of the sale, or a diminution of the price—must be exercised is not the one provided in Article 1490, but that established by the customs of the locality or, in the absence of these, that fixed by Article 1496—forty days."

Don Florencio Garcia Goyena, Chairman of the Commission which prepared the Civil Code Draft or Project of 1851, Article 1416 of which served as the model for Article 1494 of the code finally enacted (corresponding to Section 1397 of the Civil Code of Puerto Rico), in his work entitled "*Febrero Novisimo*" (Vol. 2, p. 406), treats of the actions accruing to the buyer as against the seller where the thing sold is subject to some defect. In dealing as a whole with the subject of redhibition, this author says:

"*Actions accruing to the vendor as against the vendee in case of defects in the thing sold.*

"3288. Where property whether it be real property, including hereditaments or lands producing bad grade houses or other buildings subject to a servitude, charge, or personal property, including merchandise, books, and animals, such as horses, mules and other like animals has any defect, fault or disease, the vendor must acquaint the vendee with that fact, and if such fact is concealed from the latter he may proceed against the former in two actions.

"The first one, which is called redhibitory action, whereby a rescission of the contract is sought each one of the parties recovering whatever he delivered to the other. This action may be brought within six months, counted from the date of the sale.

"The second action, which is known as action *quanti minoris* (estimatoria) may be brought within one year after the sale and has for its object the recovery by the vendee from the vendor of an amount representing the deficiency in the value of the thing sold by reason of the concealed defect, fault or vice: Laws 63, 64 and 65, Tit. 5, Partida 5.

"3289. If the vendee acted in bad faith, he is bound to indemnify any damage sustained by the buyer.

"3290. The buyer will not be entitled to bring the said actions in the following cases:

"1. Where the defect, fault or vice of the thing sold is visible.

"2. Where the seller has stated that it had them.

"3. Where he bound himself not to sue and so stated in the stipulation of the contract of sale, of which we will treat in the corresponding section.

"3291. The above actions may be brought not only with respect to things sold but also in regard to those exchanged and those given in payment or by way or dowry equivalent to a sale; all this without prejudice to the right to bring an action on the ground of fraud or 'lesion', amounting to approximately one-half of the just price, for although both these actions

> are similar in effect, their grounds are different, because the action for fraud or 'lesion' is based on the unjustness of the price, whereas the redhibitory action and the action *quanti minoris* have as their basis the lesser value which the thing sold has by reason of the fault, vice or defect." (Id., Vol. 2, p. 406.)

In his Commentaries on the Spanish Civil Code, Vol. 10, page 253, Don Jose Maria Manresa y Navarro comments favorably on the report rendered by the Board of Professors of the Superior School of Veterinary at the request of the authors of the Civil Code Draft or Project of 1851. With this report in mind, Professor Sainz y Rozas, of the School of Zaragoza, whom Manresa considers a learned author, in his work "*Tratado de Jurisprudencia Comercial Veterinaria*", page 56, states the view that in Spain the redhibitory vices and the periods prescribed for bringing the corresponding action are, with respect to cattle, those which Manresa enumerates "believing that knowledge thereof will be useful in practice," as follows:

"The inversion or fall of the uterus or vagina prior to the making of the contract	9 days
"Polmonary tuberculosis	15 days
"Epilepsy	30 days
"The vice of sucking cows (*mamonas*)	9 days
"Any condition resulting from the non-expulsion of the placenta, provided the parturition has not taken place while the cow was in the possession of the buyer	9 days."

(10 Manresa, p. 254.)

Manresa further says in this connection "that the above enumerated vices or defects, in order to cause the rescission of the contract, must be hidden in the sense in which we have used this term in commenting on Art. 1484".

The Spanish Civil Code of 1889 (containing the same sections as the sections of the Puerto Rico Code comprising the chapter on warranties against hidden defects printed in Appendix A) was taken largely from the Spanish Civil Code Bill or Project of 1851 referred to in the foregoing quotation. This Project of 1851 has often been called the parent of the Civil Code of 1889. Article 1416 of the Project of 1851 is practically the same as the first paragraph of the present Section 1397 of the Puerto Rico Code. It read:

> "The sale of cattle or other animals suffering from contagious diseases is prohibited, and any contract made with respect to the same shall be void."

This article appeared in the Project of 1851 in a chapter entitled "Warranty Against Hidden Defects or Encumbrances of the Thing". Project of 1851, however, went on to define and enumerate such hidden defects or redhibitory vices, as follows:

> "1420. With respect to cattle, the following constitute redhibitory defects:
>
> "1. The condition resulting from the non-expulsion of the placenta and the reversion or fall of the uterus or vagina, provided that the parturition took place while the cow was in the possession of the vendor.
>
> "2. *Pulmonary tuberculosis.*

"3. Epilepsy.

"4. The vice of sucking cows (*mamonas*).

"1421. In the case of subdivision one of the preceding article, the action must be brought within nine days. In the case of the other three subdivisions, with *fifteen days*." (Italics ours.)

Thus we see that as far back as 1851 and in the Project which was the direct source of the legislation we are now discussing, pulmonary tuberculosis in cattle was specifically named as a redhibitory defect, which is the petitioner's contention in this case. The Supreme Court of Puerto Rico so decided but was reversed on this point by the Circuit Court of Appeals.

As stated, Article 1416 of the Code Project of 1851 prohibited and penalized with an *apparent* nullity the sale of animals affected with or suffering from contagious diseases. But the same Project also contained general provisions in a separate chapter relating to the nullity of contracts. Therefore, if by express provisions of that Project, bovine tuberculosis was regarded as a redhibitory vice, it was because the authors of the proposed legislation intended to regulate the matter of vices or diseases in the sale of animals, within the field of the redhibitory actions, and not to include it in the scope of general rules in regard to the nullity of contracts. Not only was the existence of pulmonary tuberculosis characterized as a redhibitory vice, but a limitation of fifteen days was prescribed (Art. 1421) by the said Project for the exercise of the action based on such a vice.

Referring to the short statute of limitations provided by the present Puerto Rico Code and that provided by the Project of 1851, the Supreme Court of Puerto Rico says in its opinion:

> "What the legislature in Spain had in mind probably was that a contagious disease would manifest itself within forty days. No particular attention was given to the thought that a longer time might perhaps be necessary where tuberculosis was concerned. In any event the statute fixed forty days unless the local usages required a different period. *Ad ea quae frequentious accidunt jura adaptantur.* So much was this so that at the time of the preparation of the proposed bill of 1851 the veterinary experts thought that fifteen days was a reasonable time within which to bring a redhibitory action on account of bovine tuberculosis." (Tr. 38.)

Respondents filed a motion in the Supreme Court of Puerto Rico for reconsideration of the judgment by the Supreme Court ordering the dismissal of their complaint in this case. The Supreme Court rendered an opinion denying the motion for reconsideration, which does not appear in the transcript in this court for the reason that it was not made a part of the record in the Circuit Court of Appeals, but the opinion is printed in Spanish in the Official Edition of the Puerto Rico Reports at 46 D. P. R. 909. In that opinion the Supreme Court of Puerto Rico says (See Appendix B):

> "Assuming, however, with the proponents of the motion for reconsideration, that the sale of the animals shown to be affected with a contagious disease was entirely inexistent, never-

theless, we think that the terms of Section 1399 of the Civil Code should prevail. From time immemorial the action accruing to the purchaser of animals affected with a contagious disease was a redhibitory one. The fact, therefore, that the code perhaps made such a sale inexistent did not affect the total theory of the chapter. The essential idea of our code and of other codes was that a purchaser who had a right to annul a sale of diseased animals should begin his action within a certain limited time, in this case forty days. It makes no difference, from our standpoint, whether the action should be styled one of nullity, or of rescission, or of inexistence, or any other action arising in practice. As we pointed out, the time for filing a redhibitory action used to be at least six months, but the Legislature of Spain, *if its theory was that the sale was entirely null and void, was seeking to give the vendor some protection, and that was the possible reason why the term of 40 days was fixed. It could never have been the intention of the Spanish Legislature that a sale in good faith of diseased animals should be annullable for all time or even for the four-year period which ordinarily applies to actions for nullity.*" (Italics ours.)

It is the view of Don Jose Castan Tobeñas, Professor of Civil Law of the University of Valencia, as well as Scaevola, Manresa, Bonel y Sanchez and other commentators, that in the absence of any section in the present Code specifying the redhibitory defects in cattle, such as Article 1420 of the Project of 1851 did (*supra*), resort should be had to the enumeration of such vices set forth in the 1851 Project. In his Derecho

Civil Espanol Comun y Foral, Vol. II, page 363, he states (translating):

> "That the vice or defect in question should be determined as such by the law or local usage (Art. 1496, second paragraph). The special law above alluded to not having been enacted, the local usages only need be considered, and the latter—in the opinion of Scaevola—are those which the professional veterinarians may regard as binding in a given locality. Resort should be had to the enumeration of the redhibitory vices in animals contained in the Project of 1851 and those set forth in the works on veterinary law, among these the treatise on Commercial Veterinary Jurisprudence (Tratado de Jurisprudencia Comercial Veterinaria), written by Sainz y Rozas."

Don Calixto Valverde y Valverde, Professor of Spanish Civil Law in the University of Valladolid, in his Tratado de Derecho Civil Espanol, Vol. II, page 371, *et seq.* says (translating):

> "The Civil Code, in dealing with the subject of warranty, mentions the warranty obtaining in the sale of animals. The Code starts by a recognition of the existence of a warranty in connection with the sale of animals affected with a redhibitory vice, and regulates the matter in detail. Its provisions are as follows:
>
> "if the hidden vice of animals, even if a professional inspection has been made, should be of such a nature that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory.

"But if the veterinarian, through ignorance or bad faith, should fail to discover or to give notice of it, he shall be liable in damages.

"The redhibitory action, based on the vices or defects in the animals sold, must be instituted within forty days counted from their delivery to the vendee, unless, in accordance with the customs of the locality, longer or shorter periods are established.

"This action in the sale of animals may only be enforced with respect to such vices and defects thereof as are recognized by law or local usages."

He goes on to state that, to identify the redhibitory vices and thus overcome the difficulty resulting from a lack of any special legislation on the subject, the experts resort to the Code Project of 1851, wherein such vices are specified. In referring to the views of Manresa and of Sainz y Rozas, on this matter, Valverde says:

"From the above cited provisions it should be inferred that in the sale of animals the only redhibitory vices to be recognized as such are those established by statute or local customs, as provided in Article 1496. Such a statute, which would specify the said redhibitory vices, has not as yet been enacted in Spain, and to overcome this difficulty the experts resort to the Code Project of 1851, which enumerates them; and Mr. Manresa thinks that special attention must be given to what has been written on this subject by Mr. Sainz y Rozas in his Treatise on Veterinary Jurisprudence, which enumerates the vices and designates the periods within which the corresponding actions must be

> brought, regard being had for the customs of the locality; and it is to be observed that the limitation period of forty days prescribed for the redhibitory action in the sales of animals is a term which may be modified by local customs." (Id., p. 374.)

In the Enciclopedia Universal Ilustrado Eurepeo-Americana, we find the following concerning the warranty against hidden vices in animals, at page 1291, Vol. 53 (translating):

> "* * * The redhibitory action only lies for such hidden vices as are established by statute or local customs. No special law has been enacted, and therefore regard must be had for the local customs. However, the Code provides that any vice shall be considered as redhibitory, if it should be of such a nature that even if a professional inspection has been made, the knowledge of experts is not sufficient to discover it, and, further, that the veterinarian shall be liable in damages if through ignorance or bad faith he should fail to discover or to give notice of it. (Articles 1496, second paragraph, and 1495.) Of course, all contagious diseases and those rendering the animals useless for the use or service stated in the contract as the one for which they were acquired, are to be considered as redhibitory vices also, since they produce the nullity of the contract. (Article 1494.) * * * "

Respondents base their entire case upon the word "void" as used in Section 1397 of the Puerto Rico Code and they would interpret that word to mean "inexistent" contrary to all of the Spanish commen-

tators which we have cited. Petitioner maintains that the word "void" as used in this particular instance does not mean "inexistent" but "voidable" and the Supreme Court of Puerto Rico sustained this view. In its opinion denying reconsideration (46 D. P. R. 909) the Supreme Court said (See Appendix B):

> "In writing our original opinion we never lost from view the fact that the firm of Alonso Hermanos was maintaining that a sale of animals that were affected by a contagious disease was entirely null, void and inexistent.
>
> "In part the theory of the opinion, taking the whole history of contracts for the sale of animals, was that Section 1397 of the Civil Code ought to be understood as giving a right to annul rather than making the contract absolutely void. This was the rule from time immemorial in Spain, and the intention of the Legislature to change it should appear clearly. * * *"

The Supreme Court of Puerto Rico and the Spanish commentators have interpreted the word "void" as used in this statute to mean "voidable". They have given the word this interpretation because of the history of the section, the language of the sections surrounding Section 1397 which clearly indicate such interpretation, and the fact that the word occurs here in a section of a chapter devoted not to inexistent contracts, but to contracts which may be rescinded for break of a warranty against hidden defects. That such interpretation of the word is usual rather than otherwise is shown by the following excerpts from Corpus Juris:

"Void is not always used in an absolute or in its literal sense: it may be and often is used in the sense of 'voidable'. Matters which are properly 'voidable' are very commonly spoken of as 'void'; the two words are often used interchangeably. Indeed, *'void' is so often used in the sense of 'voidable' as to have almost lost its primary meaning; and it has been said, that whatever may be avoided, may in good sense, to this purpose, be called 'void'.*

* * * * * * *

"* * * *If there is nothing in the other language of the statute to indicate the sense in which the word was used, the general purpose of the statute, the prior rule of law on the subject, and the consequences of either construction, may be considered.*" (Italics ours.) (67 C. J. 167-169.)

and in the following definition from Bouvier's Law Dictionary:

"VOID.—That which has no force or effect. *This word is often used as in effect meaning 'voidable' only;* Bennett v. Mattingly, 110 Ind. 202, 10 N. E. 299, 11 N. E. 792; *and is seldom, unless in a very clear case, to be regarded as implying a complete nullity,* but is to be taken in a legal sense, subject to a large qualification in view of all the circumstances calling for its application and the rights and interest to be affected in a given case. Brown v. Brown, 50 N. H. 552. See Kearney v. Vaughan, 50 Mo. 287." (Id., Third Revision, vol. 3, p. 3406.) (Italics ours.)

(b) Plaintiff's only right of action was under Section 1394.

Thus far we have discussed the theory of the Civil Law principles governing actions for breach of warranty for hidden defects and what we have said would be applicable if the contract of sale covered a single tuberculous cow or if all the cattle sold had been tuberculous. However, the actual facts as found by the Trial Judge, and accepted both by the Supreme Court of Puerto Rico and the Circuit Court of Appeals, were that only a part of the animals were tuberculous. While 72 of the 122 cattle sold died, or were killed, within a little more than nine months after delivery, there is no evidence or finding as to how many of these animals were tuberculous when delivered. In fact there was no test made for tuberculosis or no examination by a veterinary until many months after the cattle had been delivered. However, there is an express finding that even at the trial, which must have occurred a considerable length of time later, since the opinion and judgment were rendered on January 12, 1931 (Tr. 23), the remaining 50 cows were "in good physical condition." Therefore at least 50 of the cattle, and we do not know how many more, were admittedly not suffering from any defect at the time of delivery.

Under these circumstances plaintiff's right of action was governed, not by Section 1397, but by Section 1394 of the Puerto Rico Civil Code which covers the precise situation and which provides:

> "Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum

> or for a special price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.
>
> "This is presumed when a team, yoke, pair or set is bought, even when a special price has been fixed for each one of the animals composing the same."

There is of course no evidence in the case that the plaintiffs would not have purchased the sound animals without the defective ones, so that the exception is irrelevant here.

In discussing Section 1491 of the Spanish Code which is identical with Section 1394 of the Puerto Rico Code, *supra,* Scaevola in his commentaries on the Civil Code gives two illustrations falling under this section in which the facts presumed are exactly the same as the facts now before the Court. In one instance he presupposes the case of the sale of cows, one of which turned out to be tuberculous, and holds that in such case the right of action of the purchaser is a redhibitory action to rescind or to claim that reduction in the sale price corresponding to the value of the one tuberculous cow. He says (translating):

> "*Doctrine of Article 1491.* 1st. Case to which it applies—The case is where 'two or more animals (and in general two or more things) are jointly sold,' whether for a lump sum or for a special price set on each of them. The Code takes no account, as a general rule, of *the joint character* of the sale, or even of the *unity* of the

price, for the purposes of the warranty by the vendor. It assumes, on the contrary, that even in a single sale for a lump sum such circumstances *do not imply the consolidation into a single whole* of the things bought, whose individuality and singularity it aims to preserve as much as possible.

"We have bought a flock of *one hundred sheep*, of which one, five, ten, turn out to be sick and useless in a greater or lesser degree (Article 1484). Although we have paid for the herd a lump, gross, sum, the Code considers, as regards the responsibility of the vendor, *that we have acquired the sheep one by one*, and hence that we are entitled to the redhibition of the defective ones and *must inevitably accept the others.*

* * * * * * *

"2nd. *General Effect.*—The provisions of Article 1491 regarding the contemplated situation which is its main origin, are very clear and logical. Suppose ten animals, ten cows, had been bought and one of them turned out to be suffering from tuberculosis and was rejected in the slaughterhouse. The redhibition then *lies of this defective animal*, with the consequences established, *both in the case of the total loss of the animal and where the purchaser is unable to use the same*, by Sections from 1486 to 1488. It can not be doubted that in this supposed case both the *quanti minoris* and the redhibitory actions lie, because it is evident that although Section 1491 *contains the word redhibition*, its provisions are not confined to the effect of the *rescission of the contract*, which is the proper object of the latter of the said two actions; firstly, because when using the word redhibition as meaning redhibitory vices, *a generic expres-*

sion is used; and secondly, because the greater, which is the redhibitory action, includes, correctly construed, the lesser, which is the *quanti minoris* action. If any doubt existed in this respect, the language of Section 1499 would immediately dissipate it.

"The purchaser, therefore, shall be entitled to the rescission of the contract with a *proportional* reimbursement of the expenses thereof, and, in a proper case, with compensation for the proper damages, or he might confine his action to claim a reduction of the purchase price or the whole of it; all of which in the terms used when dealing with sections from 1486 to 1488." (Italics ours.) (Id., Vol. 23, pp. 648-651.)

Under the facts shown by the Record, plaintiff's remedy falls not under Section 1397, but under Section 1394. Their contention that the contract is inexistent rests upon the argument that there was no consideration and no licit object of the contract, inasmuch as Section 1397 makes the sale of cattle suffering contagious diseases void. Here the record shows there was a consideration and a licit object in that at least 50 of the cattle sold were healthy. There is no provision in Section 1394 that when part of the animals are defective the contract shall be "void" even as to such animals, but on the contrary the section provides for the redhibition (rescission) of the contract as to such defective animals. It is therefore wholly immaterial on the actual facts presented in the record what interpretation we give to the word "void" as used in Section 1397. The fallacy in the majority opinion of the Circuit Court of Appeals is that it seeks to take

the word "void" out of Section 1397 and interpolate it into Section 1394 when the plain language of Section 1394 is exactly to the contrary.

The Supreme Court of Puerto Rico held, and we believe properly, that the plaintiff in accordance with Section 1394 had a right of action to rescind the sale as to the defective animals or to receive a reduction in the sale price equal to the decrease in the value of such animals, but that such action not having been brought within the 40-day period provided by Section 1399, the right of action had prescribed.

(c) The criminal statutes are irrelevant.

The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico upon this fundamental question of Spanish law largely through a mistaken application of certain sections of the Penal Code of Puerto Rico which are totally irrelevant. The majority opinion states (Tr. p. 52):

> "Other sections of the Code deal with the same subject matter, i. e., cattle infected with contagious diseases, and must be considered in this connection."

The Court then copies Sections 351, 352 and 356 of the Penal Code and a criminal statute of March 14, 1907, and continues:

> "These sections in connection with others which it is unnecessary to quote, taken together, form a plan of dealing with the menace to public health occasioned by diseased animals. Section 1397 is obviously an integral part of this plan

> and should be so considered. The Supreme Court of Puerto Rico does not seem to have had this aspect of the matter in mind. It is not referred to in the opinion, nor are the sections just quoted referred to. * * * But we see no escape from the conclusion that the Supreme Court of Puerto Rico overlooked important provisions of law and erred in disregarding the plain language of Section 1397."

The Circuit Court of Appeals states and apparently understood that the sections of the Penal Code which it quotes were a part of the Civil Code, with which, of course, the Penal Code has no relationship. The Civil Code, of which Section 1397 forms a part, is a Spanish statute founded upon Roman law, and the principles set forth in the chapter on warranties go back many centuries, while the Penal Code is a statute of American origin adopted in Puerto Rico for the first time after the American occupation and having no connection with any Spanish or Roman law. Obviously the sections of the Penal Code copied in the opinion which were taken from the criminal law of one of the American States can have no connection with the provisions of the Civil Code of Spain as to warranties, which antedated the criminal statute by many years. To hold that these sections of the Penal Code and Section 1397 of the Civil Code are integral parts of a coordinated plan was clearly erroneous.

The obvious answer to this argument of the majority of the Circuit Court Judges is of course that the criminal statutes referred to cover only the sale of animals by a vendor who knows them to be contaminated with a contagious disease, and in the present

case it is admitted that the petitioner had no such knowledge.

Nor did the Supreme Court of Puerto Rico overlook these sections of the Penal Code. In denying the respondents' motion for reconsideration, the Supreme Court said (translating from 46 D. P. R. 910; Appendix B):

> "The proponents of the motion now draw our attention to the provisions of the law making a vendor of diseased animals subject to a criminal prosecution. The answer to this suggestion is that the law only covers the sale of animals knowing them to be contaminated with a contagious disease. The Puerto Rican Legislature thought that such an act was criminal and so declared, but the fact that it declared it to be criminal does not necessarily affect the rights between parties, especially where there is no bad faith. The idea of the Spanish Legislature, and it is our own, was *Interest Reipublicae ut sit finis litium.*"

We submit that under the overwhelming weight of authority on this question of Spanish law, respondents' remedy was to sue under Section 1394 for a partial rescission of the contract and that such right of action had prescribed under Section 1399 and that the complaint was properly dismissed by the Supreme Court.

POINT II.

The Circuit Court of Appeals erred in holding that the contract could be divided and that as to the cattle suffering from tuberculosis, the contract was inexistent.

Clearly the contract was not inexistent under Section 1228 (*supra*) for lack of a licit object or consideration. At most there was a partial lack or partial failure of consideration and the 50 cattle which were admittedly sound and well were sufficient consideration to support the contract.

The prevailing opinion of the Circuit Court of Appeals admits this and holds that if the contract be considered as a single contract, then the action must fail and the judgment of the Supreme Court be affirmed. The Court says (Tr. p. 55):

> "If the herd of cattle which were sold be regarded as a unit and as the thing which was sold, a different result would be reached because about fifty of the cattle were sound and were legitimate objects of sale. The thing sold was not therefore completely unlawful as an object of commerce; the good portion of it would pass to the vendee and would have to be returned by him if he elected to rescind; the action would be redhibitory in character and would be limited by the provisions of section 1399."

The majority of the Court then proceeded by an attempted legal fiction to create two contracts between the parties, one contract covering the sound cattle,

which the Court held to be a valid and existing contract, and another and wholly different contract covering the diseased cattle, which the Court then proceeded to declare inexistent upon its theory that tuberculosis causes the inexistence of a contract and not the right to rescind. Having reached this conclusion, the Court remands the case with instructions to permit the plaintiffs to amend their complaint in the Trial Court in such a way as to make the action an action for money had and received based upon the inexistence of this fictitious contract for the sale of the diseased cattle.

In reaching this conclusion, the majority of the Court purported to follow a holding by the Supreme Court of Puerto Rico in its opinion, *but the Supreme Court never made any such holding* as a reading of its opinion will readily demonstrate.

The respondents had contended in the Trial Court and before the Supreme Court, and the Trial Court had held, that the entire contract was inexistent. Respondents maintained that they bought a herd of cattle and not 122 cows, that they bought one single thing and not 122 things; they maintained that the one thing which they bought (a herd of cattle) had tuberculosis and that therefore this one thing could not be the object of a sale under Section 1228 and that the contract was inexistent. They insisted that the Court had no right to inquire how many of the cows were diseased, that if a large part of the herd were diseased then the single thing which they bought was diseased. It was in disposing of this argument and for this purpose only that the Supreme Court used the expressions quoted in the majority opinion. The Supreme Court

held that what the respondents bought was 122 cows, that some of them might be well and some of them sick, and that it did not follow that the entire herd was suffering from a contagious disease because some of the individual cattle were diseased.

The Supreme Court held that the respondents brought 122 individual cattle but they certainly never held, nor could they possibly have intended to hold, that the parties made 122 separate contracts, one covering each cow, which is the meaning attributed by the Circuit Court of Appeals to Judge WOLF's opinion.

Section 1394 of the Civil Code (see Appendix A) expressly provides that where several animals are sold for a lump sum, the contract may be rescinded as to those animals suffering from a defect *but not as to the other animals.* The Code thus expressly provides for the partial rescission of a contract covering more than one animal and provides that in determining whether the animals sold were defective each animal must be considered separately. This is unquestionably what the Supreme Court had in mind as this is the result which that Court reached (see portion of Supreme Court's opinion italicized by the Circuit Court of Appeals in its opinion on page 55 of the transcript). This is not a decision that there was more than one contract, or that there was a separate contract covering each animal, as the Circuit Court of Appeals held, but a decision that the one single and only contract actually made may be partially rescinded.

The Supreme Court was following the doctrine of Sec. 1394, construed by Scaevola in the following words:

> "*Doctrine of Article 1491* (equivalent to Sec. 1394). 1st.—Case to which it applies. The case is where two or more animals (and in general two or more things) are jointly sold, whether for a lump sum or for a special price set on each of them. The Code takes no account, as a general rule, of the joint character of the sale, or even of the unity of the price, for the purposes of the warranty by the vendor. It assumes, on the contrary, that even in a single sale for a lump sum such circumstances do not imply the consolidation into a single whole of the things bought, whose individuality and singularity it aims to preserve as much as possible." (Commentaries, Vol. 23, p. 648.)

The theory adopted by the Circuit Court of Appeals is not only contrary to the authorities but it is untenable as a matter of logic. One single contract may well be rescinded in part and stand in part but it cannot be both existent and inexistent at the same time any more than a man may be alive and dead at the same time. Here the parties either made a contract or they did not make a contract. They certainly never made two contracts or 122 contracts. If there was a licit object and a consideration for the contract the parties actually made, then that contract constituted a contract under Section 1228 (*supra*). The Circuit Court of Appeals found there was a licit object and consideration and that there was a contract. To hold that that contract may be so divided up that part of it is a contract and another part of it is not a contract is to read into Section 1228 a provision that a contract may be partially inexistent where there is a partial lack of considera-

tion. There is no such principle in the Spanish law, nor, so far as we know, in any English common law jurisdiction. Where a contract is divisible by its nature, suit may be brought to cancel it in part or to rescind it in part, but such a suit in itself recognizes the existence of the contract, while the theory followed by the Circuit Court of Appeals is that the contract is in existence and at the same time that it never was in existence.

Upon this point we would quote the sound reasoning of the dissenting opinion of Mr. Justice BINGHAM, who says (Tr. p. 62):

> "My associates apparently think that, although there was an existing contract of sale to which a warranty attached and on which warranty an action must be brought, if at all, within six months after delivery of the things sold, the plaintiffs nevertheless have six years within which to sue for money had and received, as if there were 122 distinct contracts of sale in each of which there was a fixed sum agreed upon and paid for each of the cows, diseased or sound, and that an action for money had and received can be maintained for the price of the diseased ones, although there was no distinct price agreed upon for each cow. It is perfectly apparent that an action for money had and received would not lie under the circumstances here disclosed and that it should not be held to lie in this case, for it would be substituting an action for money had and received for an action for damages, which the warranty provided for, and extending the period within which suit might be brought from six months to six years."

That a contract is not inexistent, or partially inexistent, because of a partial lack or failure of consideration is demonstrated by the following quotation from Manresa, one of the leading Spanish commentators:

> "There are three legal definitions of consideration: One for each group of contracts; onerous, remuneratory and gratuitous. Simple and clear as the legal text is, it has far reaching effects; it establishes a presumption that may provide a consideration for every contract and, in this sense, it supplements Article 1277, explaining generally and *à priori* the execution in principle of all licit contracts. Such presumption *renders very difficult the allegation of absence of consideration in contracts, such as contracts of sale or exchange,* which by imposing reciprocal obligations carrying in themselves a sufficient consideration." (Italics ours.) Manresa's Commentaries, Vol. 8, page 678.

See also *Schluter* v. *Fernandez,* 30 P. R. R. 117, a suit for the purchase price of certain hams. While it appeared that some of the hams were rotten it also appeared that the purchaser had sold some of them which, therefore, had some value, and the Court allowed recovery of the entire contract price. Clearly if the contract were partially inexistent, or divisible, the Court could not have allowed recovery of the entire contract price.

At common law the rule, of course, is that any consideration is sufficient to support a contract and that a partial failure of consideration does not make the contract void or inexistent. (See 13 Corpus Juris 368 and cases there cited under note 2.)

We have found no case where a partial failure of consideration was held to make a contract void to the extent of such failure, nor any case holding that a single contract covering the sale of various different chattels for a lump sum could be divided up in such a way as to make void and inexistent part of the contract because of the partial failure of consideration. The practical impossibility of dividing the present contract is apparent from the allegation of the complaint that the 122 animals were sold for the lump sum of $18,000 and that they were "of different nature, race, gender, ages and color". The Court cannot remake the contract by supplying a price for each individual animal according to its "nature, race, gender and age" as the parties admittedly never contracted upon any such terms.

In reaching this decision that the single contract actually made may by some legal fiction be divided into several contracts, the majority of the Circuit Court Judges have gone far afield in order to provide a remedy where the Code itself has already provided not only a full and adequate but at the same time a logical remedy. Section 1394 of the Code (*supra*) was clearly drawn to cover the exact situation presented by the facts in this case. It provides that where animals are sold for a lump sum and some of them are defective, this shall cause the redhibition, or right to rescind, only as to the defective animals and not as to the sound animals. In connection with Section 1389 (*supra*) it provides that the remedy of the respondents under the circumstances shown was to choose between rescission

or demanding a proportional reduction of the price. As Scaevola says in interpreting this section:

> "Suppose ten animals, ten cows, had been bought and one of them turned out to be suffering from tuberculosis and was rejected in the slaughterhouse. The redhibition then lies of this defective animal." (Commentaries Vol. 23, p. 651.)

Whether the legislature acted wisely in providing that the remedy must be exercised within forty days from the delivery of the cattle (Sec. 1399, *supra*) is a matter not for judicial but for legislative determination.

The Supreme Court of Puerto Rico and Judge BINGHAM in his dissenting opinion followed these Code provisions as they were enacted by the legislature, and we submit that their decision is the only logical one under the facts in this case.

POINT III.

The Circuit Court of Appeals erred in granting to respondents permission to amend their complaint to state an action for money had and received covering the price of the diseased cattle:

(a) Because respondents had an adequate remedy upon the express contract.

The Circuit Court of Appeals found that there was a contract between the parties because the sound cattle were sufficient consideration to support a contract. That contract necessarily contained the warranties

provided by Sections 1389 *et seq.* of the Code (see appendix), which warranties were a part of the express contract between the parties. Under Sections 1389, 1394 and 1402 respondents could have recovered the price or value of the diseased animals in a suit upon the express contract, but such suit prescribed forty days after delivery of the cattle (Sections 1399, 1402) and had prescribed eight months before this suit was brought. The Circuit Court of Appeals would permit the respondents now to amend their complaint to set up this same cause of action under the guise of an action for money had and received, an action upon an implied contract. The action contemplated by the Code sections for breach of warranty, permitting the vendee to recover the price or value of the diseased cattle, and the action for money had and received proposed by the Circuit Court of Appeals are to all intents and purposes identical, and as aptly stated by Circuit Judge BINGHAM in his dissenting opinion (Tr. p. 62) the effect of permitting the amendment is to extend the period within which the suit might be brought to six years.

> "Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject matter; which is certainly sound law, unless the express contract has been rescinded or abandoned." *Hawkins* v. *United States*, 96 U. S. 698.

The civil law does not differ from the common law in this respect.

(b) Because the amendment would state an entirely new and different cause of action from that stated in the original complaint and as to such proposed new cause of action the statute has run.

The proposed amendment would state an entirely new cause of action. The complaint filed alleged that there was never any contract at all between the parties. The proposed amendment would proceed upon the theory that there were actually two contracts between the parties, and that one of them covering the sale of the tubercular cattle was inexistent, or that there was actually one contract, a part of which was existent and another part of which was inexistent at the same time. In either event the amended complaint would be directly contrary to the original allegation that there was no contract at all.

The cattle were sold and delivered on March 1, 1929. The judgment permitting the amendment was entered February 12, 1936, or almost seven years later. Even though the respondents had an action based upon the nullity of the contract, or part of the contract, that action prescribed four years after March 1, 1929.

Section 1268 of the Revised Civil Code provides:

> "Sec. 1268. The action for nullity shall last four years.
>
> "This term shall commence to run:
>
> "In cases of * * * error or deceit or falsity of consideration, from the date of the consummation of the contract."

Section 140 of the Puerto Rico Code of Civil Procedure covering the amendment of pleadings is exactly

the same as Section 473 of the California Code of Procedure, the Puerto Rico Code being taken from the Idaho Code which in turn came largely from the California Code. In conformity with the prevailing view in Code states the courts of California have repeatedly held that a complaint may not be amended to state a new or different cause of action;

Union Lumber Co. v. *Shouter Co.*, 25 Cal. App. 80; 142 Pac. 910;
Altpeter v. *Postal Tel. Cable Co.*, 26 Cal. App. 705; 148 Pac. 241;

especially where the Statute of Limitations had run against such new cause of action;

Peiser v. *Griffin*, 125 Cal. 9;

and that if the amendment states a new cause of action the amendment does not relate back to the beginning of the action so as to stop the running of the statute.

Hunt v. *Glassell*, 30 Cal. App. 676; 159 Pac. 227.

The situation in the present case is much like that disclosed by the opinion in *Warner* v. *Godfrey*, 186 U. S. 365, in which this Honorable Court reversed a judgment of the Court of Appeals of the District of Columbia which had permitted an amendment under similar circumstances.

Respondents argued before the Circuit Court of Appeals that the four year limitation provided by Section 1268 did not govern their action, upon the theory that if the contract were inexistent it would need no decree of a court to declare its nullity, and that the

only statute limiting such action would be the fifteen year statute pertaining to actions for which no specific limitation was fixed by the Code. In view, however, of the complaint filed, such position is clearly untenable. In the complaint respondents pray that the Court "enter a judgment declaring the contract null and void". They also pray for further equitable relief in that they ask the Court to decree the cancellation of the mortgages in the Registry of Property, such relief being wholly dependent upon the premise that the Court first decree the nullity of the contract. The contract consisted of obligations upon both sides, the mortgages executed and recorded being as much a part of the contract as the vendor's agreement to sell and deliver the cattle, and the fact that respondents find it necessary to ask the Court to decree the cancellation of the mortgages shows that such mortgage obligations are not "inexistent" and that an action of nullity was necessary to get rid of them.

POINT IV.

The decision of the Supreme Court of Puerto Rico upon matters relating wholly to the construction and application of local statutes, especially statutes of Spanish origin, will not be disturbed when such construction and application are not clearly wrong.

Diaz v. *Gonzalez*, 261 U. S. 102.

POINT V.

The result reached by the Circuit Court of Appeals is not a just result.

Perhaps the compelling reason in the minds of the majority of the Court for the result they reached in this case is that set out in the final words of the opinion (Tr. p. 56):

"At any rate it is the just result"

and this expression would seem to indicate that the Court itself entertained considerable doubt as to the soundness of its reasoning.

We submit that the result reached is not the just result unless we are to take the view that all Statutes of Limitation are in themselves unjust.

Respondents had their choice of two perfectly adequate remedies. They could have sued within forty days after delivery of the cattle for rescission or for damages for breach of warranty. Three of the cattle died eighteen days after delivery and six more within the next ten days, yet apparently the respondents made no effort to determine the cause of these deaths as the tuberculosis was discovered by accident by a veterinarian only in July (Tr. p. 19). Even then, when the respondents had definite knowledge of the presence of tuberculosis in the cattle, they did not bring suit but waited until December, six months later.

The Supreme Court in its opinion denying reconsideration (Appendix B) said:

> "As we pointed out in our opinion, the situation of the vendor should be considered as well as the situation of the purchaser, and such an interpretation should be put upon the law that respect the rights of both parties".

The propriety and justice of the short statute of limitations is well illustrated by the facts in this case. Three of the cattle died on March 18, just eighteen days after delivery. Two more died on March 24th, and four more on March 27th. It would seem that ordinary prudence would have induced the respondents to find out what these cattle were dying from, and to have notified the petitioner who had sold them the cattle. Yet the Trial Court found that it was only by the accidental visit of a veterinarian who went to treat a dog in July, that the respondents discovered the tuberculosis. This was over four months after the sale and delivery of the cattle. It was after this (Tr. 19) that the respondents "went to see" the petitioner and "explained the situation to him." Clearly it was impossible at that time for anyone to determine how many, if any, of the cattle had the disease at the time of the sale. Prompt action by the respondents at the time of the first deaths would have made it possible to segregate the diseased animals and avoid the spread of contagion.

As the Supreme Court says, to permit the vendee to wait or three or four years before filing suit would be unjust to the vendor, who in this case it is admitted acted in perfect good faith. The Trial Court did not

presume to find how many of the cattle had tuberculosis when they were sold. Who can say that those cattle which died in November and December already had tuberculosis when delivered on March 1st? It may well be that prompt action by the respondents to determine the cause of the first deaths would have prevented the spread of the disease and saved many of the cattle which later died. The short statute is only a fair and reasonable protection to the vendor and the requirement of prompt action on the part of the vendee is not an undue hardship. Furthermore, as the Supreme Court aptly says:

> "The idea of the Spanish Legislature, and it is our own, was *Interest Republicae ut sit finis litium.*"

CONCLUSION.

It is respectfully submitted that these most important questions of Spanish law and of general law have been erroneously decided by the Circuit Court of Appeals and that the decision of that Court should be reversed and the judgment of the Supreme Court of Puerto Rico reinstated.

Respectfully submitted,

JOSE MATOS,
By GABRIEL I. LEWIS,
His Attorney.

OSCAR B. FRAZER,
HERIBERTO TORRES SOLA,
Of Counsel for Petitioner.

APPENDIX "A".

Revised Civil Code of Puerto Rico.

Book Fourth,—Title IV,—Chapter IV,—Article Third:—

§ 2.

"Warranty against hidden defects of or burdens on the thing sold.

Sec. 1387. The vendor is bound to give a warranty against hidden defects which the thing sold may have should they render it unfit for the use to which it was destined, or if they should diminish said use in such manner that had the vendee had knowledge thereof he would not have acquired it or would have given a lower price for it; but said vendor shall not be liable for the patent defects or those which may be visible, neither for those which are not visible if the vendee should be an expert and who by reason of his trade or profession should easily perceive them.

Sec. 1388. The vendor is liable to the vendee for the warranty against faults or hidden defects in the things sold, even when they should be unknown to him.

This provision shall not obtain if the contrary should have been stipulated and the vendor should not have been aware of said faults or hidden defects.

Sec. 1389. In the cases of the two preceding sections the vendee may choose between withdrawing from the contract, the expenses which he may have incurred being returned to him, or demanding a proportional

reduction of the price, according to the judgment of experts.

If the vendor knew of the faults or hidden defects in the thing sold and did not give notice thereof to the vendee, the latter shall have the same option, and furthermore, be indemnified for the losses and damages should he choose the rescission.

Sec. 1390. If the thing sold should be lost on account of hidden faults and the vendor was aware of them, he shall bear the loss, and return the price and pay the expenses of the contract, with losses and damages. If he was not aware thereof, he shall only return the price and pay the expenses of the contract which the vendee may have paid.

Sec. 1391. If the thing sold had any hidden fault at the time of the sale, and should be lost afterwards by a fortuitous event or by fault of the vendee, the latter may demand of the vendor the price he paid, deducting the value the thing had when lost.

If the vendor acted in bad faith, he must pay losses and damages to the vendee.

Sec. 1392. There shall be no liability for losses and damages in judicial sales, but all the other provisions of the preceding section shall be applied.

Sec. 1393. Actions arising from the provisions of the five preceding sections shall be extinguished after six months, counted from the delivery of the thing sold.

Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special

price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.

This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same.

Sec. 1395. The provisions of the preceding section, with regard to the sale of animals, is understood as applicable also to the sale of other things.

Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, except in the case prescribed in the following section.

Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor.

Sec. 1398. If the hidden vice of animals, even if a professional inspection has been made, should be of such a nature that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory.

But if the veterinarian, through ignorance or bad faith, should fail to discover or to give notice of it, he shall be liable for losses and damages.

Sec. 1399. The redhibitory action, based on the vices or defects of animals must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs.

Sec. 1400. If the animal should die within three days after being bought the vendor shall be liable, provided the disease that caused the death, in the judgment of veterinarians, existed before the contract.

Sec. 1401. If the sale has been rescinded the animal must be returned in the condition in which it was sold and delivered, the vendee being liable for any injury due to his negligence and which does not arise from the redhibitory vice or defect.

Sec. 1402. In the sale of animals and cattle with redhibitory vices the vendee shall enjoy the privilege mentioned in Section 1389; but he must make use thereof within the same period which has been respectively fixed for the exercise of the redhibitory action."

APPENDIX "B".

Opinion of the Supreme Court of Puerto Rico denying motion for reconsideration. (Published in the Spanish Edition of the Official Reports at 46 D. P. R. 909.)

IN THE SUPREME COURT OF PUERTO RICO.

ALONSO HERMANOS and JOSE RAMON and MANUEL ALONSO MUÑOZ,
Plaintiffs-Appellees,
vs.
JOSE MATOS,
Defendant-Appellant.

5793
Appeal from the District Court of San Juan.

Opinion of the Court delivered by Mr. Justice WOLF.
(On reconsideration)

San Juan, Puerto Rico, June 8, 1934.

In writing our original opinion we never lost from view the fact that the firm of Alonso Hermanos was maintaining that a sale of animals that were affected by a contagious disease was entirely null, void and inexistent.

In part the theory of the opinion, taking the whole history of contracts for the sale of animals, was that Section 1397 of the Civil Code ought to be understood as giving a right to annul rather than making the contract absolutely void. This was the rule from time immemorial in Spain, and the intention of the Legis-

lature to change it should appear clearly. As we pointed out in our opinion the situation of the vendor should be considered as well as the situation of the purchaser, and such an interpretation should be put upon the law that would respect the rights of both parties. We also arrived at the conclusion that the somewhat inconsistent statements of the commentators did not affect our right to determine for ourselves the interpretation to be given to a section of the code which was intercalated in a chapter relating to warranty for hidden defects in animals.

Assuming, however, with the proponents of the motion for reconsideration, that the sale of the animals shown to be affected with a contagious disease was entirely inexistent, nevertheless, we think that the terms of section 1399 of the Civil Code should prevail. From time immemorial the action accruing to the purchaser of animals affected with a contagious disease was a redhibitory one. The fact, therefore, that the code perhaps made such a sale inexistent did not affect the total theory of the chapter. The essential idea of our code and of other codes was that a purchaser who had a right to annul a sale of diseased animals should begin his action within a certain limited time, in this case 40 days. It makes no difference, from our standpoint, whether the action should be styled one of nullity, or of rescision, or of inexistence, or any other action arsing in practice. As we pointed out, the time for filing a redhibitory action used to be at least six months, but the Legislature of Spain, if its theory was that the sale was entirely null and void, was seek-

ing to give the vendor some protection, and that was the possible reason why the term of 40 days was fixed. It could never have been the intention of the Spanish Legislature that a sale in good faith of diseased animals should be annullable for all time or even for the four year period which ordinarily applies to actions for nullity.

The proponents of the motion now draw our attention to the provisions of the law making a vendor of diseased animals subject to a criminal prosecution. The answer to this suggestion is that the law only covers the sale of animals knowing them to be contaminated with a contagious disease. The Puerto Rican Legislature thought that such an act was criminal and so declared, but the fact that it is declared to be criminal does not necessarily affect the rights between parties, especially where there is no bad faith. The idea of the Spanish Legislature, and it is our own, was *Interest reipublicae ut sit finis litium.*

The motion will be denied.

(s) ADOLPH G. WOLF,
Associate Justice.